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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN TEJEDA,

Defendant and Appellant.

2d Crim. No. B206368
(Super. Ct. No. LA056885)
(Los Angeles County)

OPINION ON REHEARING

Appellant was convicted by jury of felony vandalism exceeding \$400 in damage (Pen. Code § 594, subd. (a))¹ and the jury found true the special allegation that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) The trial court denied probation and imposed the middle term of two years in state prison and a consecutive two-year gang enhancement. Appellant argues that he was denied the effective assistance of counsel and claims the trial court erred by admitting opinion testimony. We affirm.

FACTS

Officer David Acee, with the Los Angeles Police Department, watched through binoculars as appellant and a companion spray-painted the walls and pillars of a railroad bridge. Three juveniles acted as lookouts.

¹ All further statutory references are to the Penal Code unless otherwise stated.

Acee and another officer approached the bridge and saw that appellant had wet khaki-colored spray paint on his hands and clothing. Painted on the bridge were the words "Fat Boy" and "Bst 13." "Fat Boy" is appellant's gang moniker and "Bst 13" is the Blythe Street Gang, to which he belonged.

The officers took all five suspects into custody. Three weeks earlier, police had found appellant on Blythe Street, standing approximately 10 feet away from gang graffiti that read, "Fat Boy" and "Bst." Appellant was also a member of the Pacoima Crazy Boys street gang, and had the moniker "Triste." Following his arrest for spray-painting the bridge, appellant was convicted of felony vandalism based upon evidence that the damage exceeded \$400.

DISCUSSION

Vandalism is defined as the malicious damage or destruction of the real or personal property of another. (§ 594, subd. (a).) If the amount of the damage exceeds \$400, the crime is a felony; if it is less than \$400, the offense is a misdemeanor. (*Id.*, subd. (b)(1) & (2)(A).) Appellant claims that he was denied his right to the effective assistance of counsel because his attorney failed to object to the admission of evidence concerning the dollar amount of vandalism to the bridge.

At trial, Acee testified that he had been involved in 50-60 vandalism investigations. His responsibilities included calculating the cost of removing graffiti. Acee based his estimates on a single-page document generated by the City of Los Angeles, entitled "Office of Community Beautification, Cost of Graffiti Removal" (cost document). It listed the cost of removing graffiti from a bridge as \$475. The document was marked as an exhibit and the prosecutor immediately published it to the jury via an overhead projector. The dollar amount had been highlighted. Defense counsel made a hearsay objection, which the court sustained.

The prosecutor then asked Acee how he had calculated the cost of removing graffiti in other vandalism cases. Acee testified that he used the same cost document, but stated that the cost is usually higher than \$475, because removal includes

the added expenses of sandblasting, repainting, and blocking pedestrian and vehicular traffic.

Defense counsel objected to Acee's testimony on the ground that it lacked foundation and was hearsay. The court overruled the foundational objection, stating it was admissible as within Acee's "personal experience." Defense counsel did not object to the basis upon which the testimony was admitted. Acee then testified that he estimated the total cost of graffiti removal to be \$1,425. He based this on the City's cost estimate of \$475, which he multiplied by three to account for three sections of the bridge that were vandalized. Defense made an objection on foundational grounds, but it was overruled.

The court excluded the cost document from evidence. It is undisputed that the document was hearsay because it was offered to prove the truth of the matter asserted--the cost of cleaning up the graffiti--and to establish damage of \$400 or more. (Evid. Code, § 1200, subd. (a).) Appellant argues that, absent the admission of Acee's testimony, there is no evidence that he vandalized property exceeding \$400 in value, and his conviction for felony vandalism must be reversed. He contends that he would have received a lesser sentence had Acee's testimony been excluded, because misdemeanors are not subject to a gang enhancement.

The trial court's overruling of defense counsel's foundational objections was error because the prosecutor was required to lay a foundation for the admission of Acee's testimony. (Evid. Code, § 403, subd. (a)(2).)² The court's decision to admit Acee's testimony as within his personal knowledge was likewise error because his testimony was inadmissible.

"[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such

² Evidence Code section 403, subdivision (a) provides in part that "[t]he proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] . . . [¶] (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony."

personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702, subd. (a).) A lay witness may testify to his opinion when it is rationally based on his perception and helpful to a clear understanding of his testimony. (Evid. Code, § 800, subds. (a) & (b).) Admission of a lay person's opinion testimony is subject to the sound discretion of the trial court. (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.)³

Acee testified that he had investigated 50-60 vandalism cases and knew that the city's cost estimates were usually too low. He relied upon his experience that graffiti removal also includes the expenses of sandblasting, repainting and blocking pedestrian and vehicular traffic. However, the dollar amount that formed the basis of his estimate was drawn from inadmissible evidence--the cost document. Thus Acee's testimony was likewise inadmissible. (Evid. Code, § 803.)

Appellant claims that defense counsel's failure to object to the admission of Acee's testimony based on his personal knowledge constituted the ineffective assistance of counsel. He reasons that, had defense counsel objected, and Acee's testimony been excluded, there would have been no evidence to support his conviction for felony vandalism. We observe that appellant's failure to object has waived this argument on appeal. (*People v. Farnam* (2002) 28 Cal.4th 107, 153.)

Waiver aside, to establish an ineffective assistance of counsel claim, the defendant bears the burden of demonstrating that counsel's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms" and that the deficiencies resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (2006) 39 Cal.4th at 641, 745-746.)

Appellant has established that counsel's performance was deficient; however, he has not shown prejudice. Even had Acee's testimony been excluded, there still existed a basis for the jury's finding. Submitted into evidence were twenty color

³ We do not address appellant's arguments regarding expert testimony because Acee was not qualified as an expert and his testimony was not admitted on that basis.

photographs of the crime scene. Acee testified that they accurately depicted the condition of the bridge and the amount of graffiti on the day of the offense. The jury was entitled to rely on this evidence in making its finding that the damage exceeded \$400. There is not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

DISPOSITION

The judgment is affirmed.

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COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Richard Kirschner, Judge
Superior Court County of Los Angeles

Benjamin Owens, under appointment by the Court of Appeal, for
Defendant and Appellant.

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